



6351-01

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 143

RIN 3038-AD76

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Commodity Futures Trading Commission

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending its rule that governs the maximum amount of civil monetary penalties, to adjust for inflation. This rule sets forth the maximum, inflation-adjusted dollar amount for civil monetary penalties (CMPs) assessable for violations of the Commodity Exchange Act (CEA) and Commission rules, regulations and orders thereunder. The rule, as amended, implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

DATES: *Effective Date:* This final rule will become effective [Insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), as amended by the Debt Collection Improvement Act of 1996 (DCIA),¹ requires the head of each Federal agency to adjust by regulation, at least once every four years, the maximum amount of CMPs provided by law within the jurisdiction of that agency by the cost of living adjustment defined in the FCPIAA, as amended.² Because one of the purposes of the inflation adjustments includes maintaining the deterrent effect of CMPs and promoting compliance with the law, the Commission monitors the impact of inflation on its CMP maximums and adjusts them as needed to implement the requirements and purposes of the FCPIAA.³

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) into law.⁴ Section 753 of the Dodd-Frank Act set maximum CMPs for Sections 6(c) and 6(d) of the CEA, 7 U.S.C. §§ 9, 13b.

¹ The FCPIAA, Pub. L. 101-410 (1990), and the relevant amendments to the FCPIAA contained in the DCIA, Public Law 104-134 (1996), is codified at 28 U.S.C. § 2461 note.

² The DCIA also requires that the range of minimum and maximum CMPs be adjusted, if applicable. For the relevant CMPs within the Commission's jurisdiction, the Act provides only for maximum amounts that can be assessed for each violation of the Act or the rules, regulations and orders promulgated thereunder; the Act does not set forth any minimum penalties. Therefore, the remainder of this release will refer only to CMP maximums.

³ Specifically, the FCPIAA states that the purpose of the FCPIAA is to establish a mechanism that shall allow for regular adjustment for inflation of civil monetary penalties; maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and improve the collection by the Federal Government of civil monetary penalties.

⁴ See Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

Section 753 of the Dodd-Frank Act is effective August 15, 2011, the effective date for the Commission's rules implementing this section.⁵

II. Commodity Exchange Act Civil Monetary Penalties

The inflation adjustment requirement applies to any penalty, fine or other sanction that is for a specific monetary amount as provided by Federal law; or has a maximum amount provided for by Federal law; and is assessed or enforced by an agency pursuant to Federal law; and is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts. [28 U.S.C. 2461 note.] The CEA provides for CMPs that meet the above definition and are, therefore, subject to the inflation adjustment in the following instances: Sections 6(c), 6(d), 6b, and 6c of the CEA.⁶

Section 6(c) of the CEA, as amended by Section 753(a) of the Dodd-Frank Act, sets the maximum CMP that may be imposed by the Commission in an administrative proceeding on "any person (other than a registered entity)" for: (1) each violation of Section 6(c) of the CEA "or any other provisions of [the] Act or of the rules, regulations, or orders of the Commission thereunder" to the greater of \$140,000 or triple the monetary gain to the violator; and (2) any "manipulation or attempted manipulation in violation of" Section 6(c) or 9(a)(2) of the CEA to the greater of \$1,000,000 or triple the monetary gain to the violator.⁷

Section 6(d) of the CEA, as amended by Section 753(b) of the Dodd-Frank Act, sets the maximum CMP that may be imposed by the Commission in an administrative

⁵ Prohibition of Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 FR 41398 (July 14, 2011) (implementing Section 753 of the CEA; effective August 15, 2011).

⁶ 7 U.S.C. 9, 13a, 13a-1, 13b.

⁷ 7 U.S.C. 9.

proceeding on “any person (other than a registered entity⁸)” for violations of the CEA “or any other provisions of [the CEA] or of the rules, regulations, or orders of the Commission thereunder” to “the greater of \$140,000 or triple the monetary gain” to the violator.⁹

Section 6b of the CEA provides that the Commission in an administrative proceeding may impose a CMP on: (1) any registered entity for not enforcing or has not enforced its rules of government made a condition of its designation or registration” as set forth in the CEA, or (2) “any registered entity, or any director, officer, agent, or employee of any registered entity,” for violations of the CEA “or any rules, regulations, or orders of the Commission thereunder.”¹⁰ For each violation for which a CMP is assessed pursuant to Section 6b, Rule 143.8(a)(3) sets the current maximum penalty at: the greater of \$1,000,000 or triple the monetary gain to such person for manipulation or attempted manipulation in violation of Section 6(c), 6(d), or 9(a)(2) of the CEA; and the greater of \$675,000 or triple the monetary gain to such person for all other violations.¹¹

Section 6c of the CEA provides that Commission may bring an action in the “proper district court of the United States or the proper United States court of any

⁸ The term “registered entity” is a defined term under the CEA. Section 1a(40) provides that the term “registered entity” means a board of trade designated as a contract market under section 7 of the CEA; a derivatives clearing organization registered under section 7a–1 of the CEA; a board of trade designated as a contract market under section 7b–1 of the CEA; a swap execution facility registered under section 7b–3 of the CEA; a swap data repository registered under section 24a of the CEA; and with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

⁹ 7 U.S.C. 1a(40).

¹⁰ 7 U.S.C. 13b.

¹¹ 7 U.S.C. 13a.

¹¹ 17 C.F.R. 143.8(a)(3).

territory or other place subject to the jurisdiction of the United States” and the court may impose on a CMP on “any registered entity or other person” found by the court to have committed any violation of any provision of the CEA “or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery or any swap.”¹²

For each violation for which a CMP is assessed pursuant to Section 6c(d), Rule 143.8(a)(2) sets the current maximum penalty at: the greater of \$1,000,000 or triple the monetary gain to such person for manipulation or attempted manipulation in violation of Section 6(c), 6(d), or 9(a)(2) of the CEA; and the greater of \$140,000 or triple the monetary gain to such person for all other violations.¹³

III. Cost-of-Living Adjustment for Commodity Exchange Act Civil Monetary Penalties

A. Methodology

The formula for determining the cost-of-living adjustment, first defined by the FCPIAA, and amended by the DCIA, consists of a four-step process.

The first step entails determining the inflation adjustment factor. This is done by calculating the percentage increase by which the Consumer Price Index for all-urban consumers published by the Department of Labor (CPI)¹⁴ for the month of June of the calendar year preceding the adjustment exceeds the CPI for the month of June of the

¹² 7 U.S.C. 13a-1.

¹³ 17 CFR 143.8(a)(2).

¹⁴ The Consumer Price Index means the Consumer Price Index for all urban consumers published by the Department of Labor. Interested parties may find the relevant Consumer Price Index on the Internet. To access this information, go to the Consumer Price Index Home Page at: <http://www.bls.gov/cpi/>. Under the “CPI Databases” heading, select “CPI--All Urban Consumers (Current Series)”, “Top Picks.” Then check the box for “U.S. All Items, 1967=100-CUUR0000AA0”, and click the “Retrieve data” button.

calendar year in which the amount of such CMP was last set or adjusted pursuant to law. The CMPs for Sections 6(c) and 6(d) of the CEA were last set by the Dodd-Frank Act, effective in the calendar year 2011. The CMPs for Sections 6b and 6c of the CEA were last set by Commission Rule, effective in the calendar year 2008.¹⁵ Accordingly, the inflation adjustment factor for Sections 6(c) and 6(d) of the CEA equals the CPI for June 2011 (i.e., June of the year preceding this year) divided by that index for June 2011, and the inflation adjustment factor for Sections 6b and 6c of the CEA equals the CPI for June 2011 divided by that index for June 2008.¹⁶

Second, the inflation adjustment factors are then multiplied by the current maximum CMPs to calculate the raw inflation increase. Third, this raw inflation increase is then rounded according to the guidelines set forth by the FCPIAA to calculate the final inflation increase.¹⁷ Fourth, the final inflation increase is added to the current CMP maximum to obtain the new CMP maximum penalty.

B. Civil Monetary Penalty Adjustments

In Commission actions pursuant to Sections 6(c) or (d) of the CEA, the amount set for the maximum CMP for manipulation or attempted manipulation violations is \$1,000,000, and the amount set for the maximum CMP for all other violations is

¹⁵ See Adjustment of Civil Monetary Penalties for Inflation, 73 FR 57512 (Oct. 3, 2008) (effective Oct. 23, 2008).

¹⁶ The CPI for June 2011 was 676.162, and the CPI for June 2008 was 655.474. Therefore, the relevant inflation adjustment factor for Sections 6(c) and 6(d) of the Act equals 676.162 divided by 676.162, which is 0.0 for computational purposes, and for Sections 6b and 6c equals 676.162 divided by 655.474, which is 0.0316 for computational purposes.

¹⁷ The FCPIAA, as amended by the DCIA, provides in relevant part that any increase shall be rounded to the nearest multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and multiple of \$25,000 in the case of penalties greater than \$200,000.

\$140,000. Applying the CPI adjustment methodology, no adjustment to these CMP amounts is required.¹⁸

In Commission actions pursuant to Section 6b of the CEA, the amount set for the CMP for manipulation and attempted manipulation violations is \$1,000,000 (or triple the monetary gain) and the amount set for the CMP for all other violations is \$675,000 (or triple the monetary gain). Applying the CPI adjustment methodology, these CMP amounts must be increased by \$25,000 each, and the new CMP maximums are \$1,025,000 (or triple the monetary gain) for manipulation and attempted manipulation violations, and \$700,000 (or triple the monetary gain) for all other violations.¹⁹

In Commission actions pursuant to Section 6c of the CEA, the amount set for the CMP for manipulation and attempted manipulation violations is \$1,000,000 (or triple the monetary gain) and the amount set for the CMP for all other violations is \$140,000 (or triple the monetary gain). Applying the CPI adjustment methodology, the CMP amount for manipulation and attempted manipulation violations must be increased by \$25,000 to \$1,025,000 (or triple the monetary gain), while the CMP amount for all other violations remains unchanged at \$140,000 (or triple the monetary gain).²⁰

¹⁸ Because the inflation adjustment factor for these CMPs is 0.0, the CMP amounts are not required to be revised pursuant to FCPIAA.

¹⁹ Multiplying the CMP amounts by the inflation adjustment factor results in a raw adjustment amount of \$31,562 for manipulation and attempted manipulation violations ($0.03156 \times \$1,000,000$), and a raw adjustment amount of \$21,304 for all other violations ($0.03156 \times \$675,000$). Because the CMP amounts are greater than \$200,000, the raw adjustment amounts must be rounded to the nearest \$25,000, which results in a final adjustment amount of \$25,000 for all violations, including manipulation and attempted manipulation violations.

²⁰ Multiplying the CMP amounts by the inflation adjustment factor results in a raw adjustment amount of \$31,562 for manipulation and attempted manipulation violations ($0.03156 \times \$1,000,000$), and a raw adjustment amount of \$3,156 for all other violations ($0.03156 \times \$140,000$). Because the CMP amount for manipulation and attempted

The FCPIAA provides that “any increase under [FCPIAA] in a CMP shall apply only to violations which occur after the date the increase takes effect.”²¹ Thus, the new CMP amounts may be applied only to violations of the CEA that occur after the effective date of this amendment, October 23, 2012.

IV. Administrative Compliance

A. Notice Requirement

The notice and comment procedures of 5 U.S.C. 553 do not apply to this rulemaking because the Commission is acting herein pursuant to statutory language which mandates that the Commission act in a nondiscretionary matter. *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 10 (D.C. Cir. 2011).²²

B. Regulatory Flexibility Act

The Regulatory Flexibility Act²³ requires agencies with rulemaking authority to consider the impact of certain of their rules on small businesses. A regulatory flexibility analysis is only required for “rule[s] for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) ... or any other law.” As the

manipulation violations is greater than \$200,000, the raw adjustment amount must be rounded to the nearest \$25,000, which results in a final adjustment amount of \$25,000 for these violations. Because the CMP amount for all other violations is less than \$200,000, the raw adjustment amount must be rounded to the nearest \$10,000, which results in a final adjustment amount of \$0 for these violations.

²¹ See also *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (holding that there is a presumption against retroactivity in changes to damage remedies or civil penalties in the absence of clear statutory language to the contrary).

²² The Commission has determined that the amendment to Rule 143.8 is exempt from the provisions of the Administrative Procedure Act, 5 U.S.C. 553, which generally require notice of proposed rulemaking and provide other opportunities for public participation, but excludes rules of agency practice, such as those found in part 143 of the Commission’s regulations, and in particular rule 143.8 being revised herein.

²³ 5 U.S.C. 601-612.

Commission is not obligated by section 553(b) or any other law to publish a general notice of proposed rulemaking with respect to the revisions being made to regulation 143.8, the Commission additionally is not obligated to conduct a regulatory flexibility analysis.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3507(d), which imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to this rule. This rule amendment does not contain information collection requirements that require the approval of the Office of Management and Budget.

D. Consideration of Costs and Benefits

Section 15(a) of the CEA, 7 U.S.C. 19(a), requires the Commission to consider the costs and benefits of its action before issuing a new regulation. Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The Commission believes that benefits of this rulemaking greatly outweigh the costs, if any. As the Commission understands, the statutory provisions by which it is making cost-of-living adjustments to the civil money penalties in regulation 143.8 were enacted to ensure that civil money penalties do not lose their deterrence value because of inflation. An analysis of the costs and benefits of these adjustments were made before enactment of the statutory provisions under which the Commission is operating, and limit

the discretion of the Commission to the extent that there are no regulatory choices the Commission could make that would supersede the pre-enactment analysis with respect to the five factors enumerated in section 15(a), or any other factors.

List of Subjects in 17 CFR Part 143

Civil monetary penalties, Claims.

In consideration of the foregoing and pursuant to authority contained in Sections 6(c), 6(d), 6b and 6c of the CEA, 7 U.S.C. 9, 13a, 13a-1(d), 13b, and 28 U.S.C. 2461 note, the Commission hereby amends part 143 of chapter I of title 17 of the Code of Federal Regulations as follows:

PART 143--COLLECTION OF CLAIMS OWED THE UNITED STATES ARISING FROM ACTIVITIES UNDER THE COMMISSION'S JURISDICTION

1. The authority citation for part 143 continues to read as follows:

Authority: 7 U.S.C. 9, 15, 9a, 12a(5), 13a, 13a-1(d), 13(a), 13b; 31 U.S.C. 3701-3719; 28 U.S.C. 2461 note.

2. Section 143.8 is amended by revising paragraph (a) to read as follows:

§ 143.8 Inflation-adjusted civil monetary penalties.

(a) Unless otherwise amended by an act of Congress, the inflation-adjusted maximum civil monetary penalty for each violation of the Commodity Exchange Act or the rules, regulations or orders promulgated thereunder that may be assessed or enforced under the Commodity Exchange Act in an administrative proceeding before the Commission or a civil action in Federal court will be:

(1) For a civil penalty assessed pursuant to Section 6(c) of the Commodity Exchange Act, 7 U.S.C. 9, against any person (other than a registered entity):

(i) For manipulation or attempted manipulation violations:

(A) Committed on or after May 22, 2008, not more than the greater of \$1,000,000 or triple the monetary gain to such person for each such violation; and

(ii) For all other violations:

(A) Committed between November 27, 1996 and October 22, 2000, not more than the greater of \$110,000 or triple the monetary gain to such person for each such violation;

(B) Committed between October 23, 2000 and October 22, 2004, not more than the greater of \$120,000 or triple the monetary gain to such person for each such violation;

(C) Committed between October 23, 2004 and October 22, 2008, not more than the greater of \$130,000 or triple the monetary gain to such person for each such violation; and

(D) Committed on or after October 23, 2008, not more than the greater of \$140,000 or triple the monetary gain to such person for each such violation; and

(2) For a civil monetary penalty assessed pursuant to Section 6(d) of the Commodity Exchange Act, 7 U.S.C. 13b, against any person (other than a registered entity):

(i) For violations committed on or after August 15, 2011, not more than the greater of \$140,000 or triple the monetary gain to such person for each such violation; and

(ii) [Reserved]

(3) For a civil monetary penalty assessed pursuant to Section 6b of the Commodity Exchange Act, 7 U.S.C. 13a, against any registered entity or any director, officer, agent, or employee of any registered entity:

(i) For manipulation or attempted manipulation violations:

(A) Committed between May 22, 2008 and August 14, 2011, not more than the greater of \$1,000,000 or triple the monetary gain to such person for each such violation;

(B) committed on or after August 15, 2011, not more than the greater of \$1,025,000 or triple the monetary gain to such person for each such violation; and

(ii) For all other violations:

(A) Committed between November 27, 1996 and October 22, 2000, not more than \$550,000 for each such violation;

(B) Committed between October 23, 2000 and October 22, 2004, not more than \$575,000 for each such violation;

(C) Committed between October 23, 2004 and October 22, 2008, not more than \$625,000 for each such violation;

(D) committed between October 23, 2008 and October 22, 2012, not more than the greater of \$675,000 or triple the monetary gain to such person for each such violation; and

(E) Committed on or after October 23, 2012, not more than the greater of \$700,000 or triple the monetary gain to such person for each such violation and

(4) For a civil monetary penalty assessed pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. 13a-1, against any registered entity or other person:

(i) For manipulation or attempted manipulation violations:

(A) Committed between May 22, 2008 and August 14, 2011, not more than the greater of \$1,000,000 or triple the monetary gain to such person for each such violation; and

(B) Committed on or after August 15, 2011, not more than the greater of \$1,025,000 or triple the monetary gain to such person for each such violation; and

(ii) For all other violations:

(A) Committed between November 27, 1996 and October 22, 2000, not more than the greater of \$110,000 or triple the monetary gain to such person for each such violation;

(B) Committed between October 23, 2000 and October 22, 2004, not more than the greater of \$120,000 or triple the monetary gain to such person for each such violation;

(C) Committed between October 23, 2004 and October 22, 2008, not more than the greater of \$130,000 or triple the monetary gain to such person for each such violation;
and

(D) Committed on or after October 23, 2008, not more than the greater of \$140,000 or triple the monetary gain to such person for each such violation.

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Issued in Washington, DC on October 18, 2012, by the Commission.

Sauntia S. Warfield
Assistant Secretary of the Commission

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Adjustment of Civil Monetary Penalties for Inflation —Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O’Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

[FR Doc. 2012-26090 Filed 10/24/2012 at 8:45 am; Publication Date: 10/25/2012]